

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

ALVARO JESUS ZAPATA,

Defendant

Criminal No. 97-28-P-C

GENE CARTER, Chief Judge

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

The Court now has before it Defendant's Motion to Dismiss the Indictment (Docket No. 7) under Federal Rule of Criminal Procedure 12. The Indictment alleges that Defendant violated 18 U.S.C. § 1001 when he "willfully and knowingly [made] false representations of material facts in a matter within the jurisdiction of the United States Marshals Service of the Department of Justice, an agency of the United States, in that he stated and represented that his name [was] Ricardo Gonzalez, when, in truth and fact, as the Defendant then and there well knew, this statement was false, in that his true name is Alvaro Jesus Zapata." Indictment (Docket No. 4). The Defendant argues that the "exculpatory no" doctrine applies to this case, requiring the Court to dismiss the Indictment. The Government objects to the application of the "exculpatory no" doctrine in the circumstances of this case.

The pertinent facts are set forth in the Affidavit of David

A. Drake as follows. For several months, Drake was investigating the whereabouts of Defendant Zapata, whom he knew to be wanted on an arrest warrant issued on February 10, 1989, by the United States District Court in the Central District of California. During the course of his investigation, the United States Marshals Service in the Central District of California telefaxed Drake a copy of the warrant and a copy of Zapata's 1987 California photographic driver's license. Aware that Defendant would be arriving by commercial airline in Portland, Maine on June 4, 1997, Drake went to the airport and observed the Defendant, whom he recognized as Alvaro Zapata from the photograph on the California driver's license.

Drake approached the Defendant, identified himself as a Deputy United States Marshal, and asked for identification to establish his identity. The Defendant gave Drake a Florida photographic driver's license in the name of Ricardo Gonzalez. Drake asked the Defendant his identity a second and a third time, and each time Defendant replied that his name was Ricardo Gonzalez. Drake then executed the California warrant for a narcotics violation, placing Defendant under arrest.

The First Circuit discussed the "exculpatory no" doctrine in United States v. Chevoor, 526 F.2d 178 (1st Cir. 1975), cert denied, 425 U.S. 935 (1976), where it found that the false statement at issue came within the "exculpatory no" exception because the statement was a mere false denial of criminal activity, as distinguished from an affirmative misrepresentation.

Since Chevoor the Court of Appeals for the First Circuit has not had the opportunity to again directly address the issue. In passing, however, the First Circuit has acknowledged "the arbitrariness of a court-drawn line between affirmative and exculpatory negative responses." United States v. Poutre, 646 F.2d 685, 686 (1st Cir. 1980). More recently other circuits have fashioned a five-part test to determine whether "exculpatory no" applies. A false statement does not violate § 1001 when:

- (1) it was made in pursuit of a claim to a privilege or a claim against the government;
- (2) it was made in response to inquiries initiated by a federal agency or department;
- (3) it did not pervert the basic functions entrusted by law to the agency;
- (4) it was made in the context of an investigation rather than in the routine exercise of administrative responsibility; and
- (5) it was made in a situation in which a truthful answer would have incriminated the declarant.

Moser v. United States, 18 F.3d 469, 474 (7th Cir. 1994); United States v. Taylor, 907 F.2d 801, 805 (8th Cir. 1990); United States v. Cogdell, 844 F.2d 179, 183 (4th Cir. 1988); United States v. Medina dePerez, 799 F.2d 540, 544 & n.5 (9th Cir. 1986). But see United States v. Rodriguez-Rios, 14 F.3d 1040 (5th Cir. 1994); United States v. Steele, 933 F.2d 1313, 1320 (6th Cir.), cert denied, 502 U.S. 909 (1991). Applying this test, the Court finds that while the facts of this case arguably fulfill the first four elements of the test, the fifth element is not satisfied. Although Defendant's disclosure of his true

identity may have prejudiced him, it did not incriminate him in the alleged narcotics activity for which the warrant was issued.

Accordingly, it is ORDERED that Defendant's Motion to Dismiss the Indictment be, and it is hereby, DENIED.

GENE CARTER
District Judge

Dated at Portland, Maine this 1st day of August, 1997.